IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 7, 2008

IN RE J.D.C., J.Y.M.C., and A.M.C.

Appeal from the Juvenile Court for Washington County
Nos. 31,488, 31,489, 31,490 Sharon M. Green, Judge

No. E2007-02371-COA-R3-PT - FILED APRIL 30, 2008

This is a termination of parental rights case. The father of the three minor children at issue appeals an order terminating his parental rights. We hold that the evidence in the record supports, by clear and convincing evidence, the trial court's dual findings of (1) abandonment due to willful failure to provide support and (2) substantial noncompliance with permanency plans. The State concedes that the trial court's finding of "persistent conditions" is not supported by the evidence; accordingly, the judgment is modified to delete this finding. Father concedes that he has failed to provide a suitable home. Clear and convincing evidence supports the trial court's finding that it is in the best interest of the children to terminate father's parental rights. As modified, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed as Modified; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Eric D. Reach, Johnson City, Tennessee, for the appellant, J.C.

Robert E. Cooper, Jr., Attorney General and Reporter, and Scott Edward Schwieger, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee Department of Children's Services.

Scotty Perrin, Johnson City, Tennessee, guardian *ad litem*.

OPINION

I.

This case involves the termination of parental rights with respect to the three biological children of J.C. ("Father") and T.H. ("Mother"). Father and Mother were never married to each other, but did reside together at times. In June 2005, the State of Tennessee Department of Children's Services ("DCS") became involved with the family upon a referral suggesting that the two oldest children, J.D.C. and J.Y.M.C., had been exposed to drugs. At that time, Mother, then age 25, was pregnant with the parties' third child. Upon an investigation by DCS, Mother admitted that she was using marijuana and agreed to submit to alcohol and drug treatment through Family Support Services. Soon thereafter, however, Mother moved and the case was closed due to non-compliance.

Two months later, DCS received another referral predicated upon the fact that the two older children were drug exposed and at risk of physical injury. DCS workers, during an attempt to investigate the referral, could not get anyone to answer the door at the residence. When, in the following month, DCS received a third referral based upon the same allegations, DCS located Mother and entered into an immediate "safety" agreement with her, pursuant to which she was offered the opportunity to receive drug and mental health treatment along with in-home services. Since Mother had alleged that Father had been guilty of violence toward her, she was placed in a "Safe-Passage Domestic Violence Shelter."

On October 12, 2005, the parties' third child, A.M.C.,[1] was born with cocaine in her system. On October 17, 2005, all three children were placed in the emergency custody of DCS. Six days later, DCS petitioned to have the children adjudicated dependant and neglected. In November 2005, DCS located Father. Father, then 50 years old, indicated that he and Mother had been together for five or six years, but that they had recently broken up because of Mother's drug use. Based upon their exposure to drug abuse, the children were adjudicated dependent and neglected on December 7, 2005.[2]

Permanency plans were developed for both parents as to each of the children on November 2, 2005, and ratified by the trial court a month later. The goal for each of these plans was to return custody to the parents or a relative. Father's responsibilities pursuant to his "Actions Needed to Achieve Desired Outcome" were to submit to an alcohol and drug assessment, complete an intake for family and/or couples counseling, and participate in a parenting and/or psychological assessment. Father agreed to the plans and signed them. He was to complete all of the plan requirements by December 15, 2005; he was ordered to follow all of the recommendations of the assessments. Father was further required to maintain and provide documentation of a safe, sanitary, hazard-free home for a period of at least 6 months, attend medical appointments for the oldest child, maintain frequent contact with DCS and the children through the agency, and pay $25 per child per month in child support.

---

[1]Until Father's paternity was proven during this proceeding, the child was identified as A.M.H.

[2]Father had notice of the hearing but did not attend.

Approximately ten months after the first permanency plans were developed, a second set was created essentially stating the same requirements as the prior plans but adding the goal of adoption. This second set of plans was not signed by Father; Christy Moore of DCS testified that Father frequently refused to sign documents submitted to him. Father did, however, attend the September 26, 2006, hearing, at which time the trial court ratified the revised set of plans. The court at that time advised Father of the statutory grounds for termination of parental rights.

Shortly after the first permanency plans became effective, Father and Mother began living together again. On December 22, 2005, Father informed DCS that he was living at a shelter, the Haven of Mercy. Ms. Moore offered to help Father and Mother secure a place to live with funding from DCS to pay deposits on their apartment and utilities, but Father refused her offer. Less than a month later, a letter from DCS sent to Father at the shelter was returned bearing notice that Father had moved without leaving a forwarding address.

By April 2006, Father and Mother had apparently broken up again. Although DCS provided Father with a letter to present to public housing authorities, Father told DCS in May 2006 that he was living at a Salvation Army homeless shelter. However, when DCS tried to contact Father there two months later, the Salvation Army advised the agency that Father had been removed from the facility for fighting with another resident.

A psychological intake and parenting assessment that DCS funded for Father was scheduled at Frontier Health on May 22, 2006. Father called and canceled the appointment. Father's appointment was rescheduled for June 9, 2006, but he failed to attend. The assessment was rescheduled for a third time for June 26, 2006, but Father again called and canceled. With the help of Ms. Moore, who wrote a letter urging Frontier Health to give Father another opportunity, Father finally arrived for an intake on October 2, 2006. As a result of the evaluation, Frontier Health recommended parenting classes, couples therapy for Mother and Father, and in-home case management. However, while Ms. Moore encouraged Father to take advantage of these services, he refused.

The therapeutic visitation services agreed upon in the permanency plans began on August 18, 2006, with Family Preservation Specialist Patty Cline of Solutions, Inc., retained by DCS to conduct two-hour visits every Friday. These visits were initially held at the DCS office, at which time Ms. Cline would observe the parents' interactions with the children and would teach parenting skills as needed.

Visitations, while regularly kept during the first months following removal from the parents, became more sporadic after the second set of permanency plans was developed. Father initially lived up to some of his required responsibilities by feeding the children, changing their diapers, showing them movies, and providing them with toys. Father also gave the children birthday presents and clothes occasionally. According to Ms. Cline, however, while Father was good at providing food and changing diapers for the smaller children, he was unable to discipline the children and failed to show any improvement in this area.

In October 2006, after Mother and Father moved into a two bedroom apartment, visitations with the children began to be held there. Though their house was acceptable for therapeutic visits, DCS informed Father that the apartment was not an appropriate home for the children with Mother living there still actively using drugs. Ms. Moore testified that DCS was not telling Father that he had to break up the family. According to Ms. Moore, Father told her that he and Mother "were not going to be together," so she informed Father that if Mother "was going to live there she needed to comply with the Plan as well."

A petition for termination of the parental rights of both parents was filed by DCS on November 15, 2006. Four grounds for termination were alleged: abandonment by failing to make reasonable support payments in the four months immediately preceding the filing of the petition; abandonment by failing to provide a suitable home; substantial non-compliance with the permanency plans; and persistent "endangering" conditions.

Around the end of December 2006, Mother told DCS that because of a domestic violence incident with Father, she had moved out of their shared apartment. After Mother moved out, she and Father divided the therapeutic visitation time, each getting a visit every other Friday. Some of the visits with Father were partially unsupervised, since, on each of these visits, Ms. Cline was present for only part of the time. Ms. Cline noted, however, that when she would start to leave, the middle child would wrap himself around one of her legs in an effort to stop her from leaving him with Father.

In early 2007, Father became inconsistent with his visits. He did not attend one of the January 2007 visits and canceled the other. He failed to attend at least two other visits. He made two visits in February, two in March, one in April, and two in May. Father's only visit in June – on June 22, 2007 – was his last. The testimony at the hearing revealed that toward the end of the visits, Father threatened to kill everybody at DCS because they were stopping him from getting his kids. Ms. Cline testified that, because of this threat, she was afraid to be alone with Father. At DCS's suggestion, the visits were moved to a public place.

According to Ms. Cline, Father told her that he did not want to spend his two hours disciplining his children. At the next to the last visit, Father was rude and uncooperative with Ms. Cline. At one visit, Father told Ms. Cline: "Don't tell my children what to do" and "Don't tell me how to parent my children." At the last visit, Ms. Cline observed that Father refused to give the baby a regularly scheduled breathing treatment because he did not feel like she needed it. The testimony of Ms. Moore and Ms. Cline revealed that they never observed any improvement in Father's parenting skills. Ms. Moore indicated that she saw only a weak bond between Father and the oldest son, and no bond between Father and the other two children.

While Father was being provided therapeutic visitation services, he was also being given urine drug screens at DCS's expense. Father was serving a probation sentence stemming from a drug charge. Father failed many of the screens. Father contended that his use of prescription Lortab and

Hydrocodone caused false positives for opiates; however, when Ms. Cline confronted Father about cocaine positives, he was unable to provide a reason for these results.

Father received a drug and alcohol assessment at DCS's expense on November 20, 2006. He told the counselor that he did not want any services and that he was there only because DCS made him participate. The counselor recommended weekly outpatient therapy for drug and alcohol issues. Father agreed to attend. The therapy course required the completion of eight sessions; Father dropped out after five.

Father's termination hearing was held on October 2, 2007, after which the court terminated his parental rights. Despite knowing when and where to appear, Father showed up two hours late for the trial. Father refused to testify or put on any proof, but made a lengthy unsworn statement to the trial court. He stated that the DCS witnesses were "telling a bunch of lies" about (1) the results of his drug screens, (2) DCS's cooperation in his therapeutic visits, and (3) his threatening behavior toward DCS staff. He claimed that he had finished parenting training and provided the court a "Certificate of Completion" dated September 27, 2007, which indicated that he "completed 8 out of 8 sessions of Parenting Skills Group."

The final order terminating Father's parental rights was entered October 25, 2007.[3] Father appeals from this final order.

II.

The relevant issues presented by Father on appeal, as restated by this court, are as follows:

> 1. Whether the trial court erred in finding that the termination of Father's parental rights was in the best interests of the children, and whether the trial court should have placed application of findings of fact to the factors set forth in Tenn. Code Ann. § 36-1-113(i) on the record in determining whether termination of parental rights was in the best interests of the children.
>
> 2. Whether the trial court erred in terminating Father's parental rights to all three children based upon the statutory ground of abandonment due to his alleged failure to pay support.
>
> 3. Whether DCS proved by clear and convincing evidence that persistent conditions existed that would in all probability cause the children to be subjected to further abuse and neglect and prevented the children's return to the care of Father.

[3] Trial as to Mother's parental rights took place on August 28, 2007. The trial court entered an order terminating her rights on October 26, 2007.

4. Whether DCS made reasonable efforts in assisting Father in achieving the goals of the permanency plans.

III.

In cases involving the termination of parental rights, our duty on factual matters is to "determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence." ***In re F.R.R., III***, 193 S.W.3d 528, 530 (Tenn. 2006). The trial court's findings of fact are reviewed *de novo* upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); ***In re F.R.R., III,*** 193 S.W.3d at 530. In weighing the preponderance of the evidence, great weight is accorded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. *See* ***Jones v. Garrett***, 92 S.W.3d 835, 838 (Tenn. 2002). Questions of law are reviewed *de novo* with no presumption of correctness. ***Langschmidt v. Langschmidt***, 81 S.W.3d 741, 744-45 (Tenn. 2002).

Trial courts, unlike appellate courts, are able to observe witnesses as they testify and to assess their demeanor. Thus, trial courts are in a unique position to evaluate witness credibility. *See* ***State v. Pruett***, 788 S.W.2d 559, 561 (Tenn. 1990). Accordingly, appellate courts will not re-evaluate a trial court's assessment of witness credibility absent clear and convincing evidence to the contrary. *See* ***Wells v. Tennessee Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999), ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315, 315-16 (Tenn. 1987).

Parents have a fundamental right to the care, custody, and control of their children. ***Stanley v. Illinois***, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); ***O'Daniel v. Messier***, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995) (rev'd on other grounds, ***In re Swanson***, 2 S.W.3d 180 (Tenn. 1999)); ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right "is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." ***In re M.J.B.***, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." ***Means v. Ashby***, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (quoting Tenn. Code Ann. § 36-1-113(l)(l)). "Few consequences of judicial action are so grave as the severance of natural family ties." ***M.L.B. v. S.L.J.***, 519 U.S. 102, 119, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (quoting ***Santosky v. Kramer***, 455 U.S. 745, 787, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

While parental rights are superior to the claims of other persons and the government, they are not absolute, and they may be terminated upon appropriate statutory grounds. *See* ***Blair v. Badenhope***, 77 S.W.3d 137, 141 (Tenn. 2002). Due process requires clear and convincing evidence of the existence of the grounds for termination of the parent-child relationship. ***In re Drinnon***, 776 S.W.2d at 97. Tenn. Code Ann. § 36-1-113 (Supp. 2007) governs termination of parental rights in this state. A parent's rights may be terminated only upon "(1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been

established; and (2) [t]hat termination of the parent's or guardian's rights is in the best interests of the child." Tenn. Code Ann. § 36-1-113(c); ***In re F.R.R., III,*** 193 S.W.3d at 530. Both of these elements must be established by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1); ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002). The existence of at least one statutory basis for termination of parental rights will support the trial court's decision to terminate those rights. ***In re C.W.W.***, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000) (abrogated on other grounds, ***In re Audrey S.***, 182 S.W.3d 838 (Tenn. Ct. App. 2005)).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. ***In re C.W.W.***, 37 S.W.3d at 474; ***In re M.W.A., Jr.***, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, ***State v. Demarr,*** No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., filed August 13, 2003), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. ***In re Valentine***, 79 S.W.3d at 546; ***In re S.M.***, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); ***In re J.J.C.***, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. ***In re A.D.A.***, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); ***Ray v. Ray***, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); ***In re C.W.W.***, 37 S.W.3d at 474.

IV.

We initially note that Father does not challenge the finding that he failed to establish a suitable home for the children in the first four months they were in foster care. It is undisputed that he was transient and did not have a steady home. Father moved around and did not keep DCS updated with respect to his address, causing some letters from DCS to be returned as undeliverable. This ground alone, if accompanied by the necessary "best interest" finding, would support termination of Father's parental rights. ***In re D.L.B.***, 118 S.W.3d 360, 367 (Tenn. 2003).

A.

Father argues that the termination of his parental rights was not in the best interest of the children. He further argues that the trial court should have applied findings of fact to the specific factors set forth in Tenn. Code Ann. § 36-1-113(i).

In Tennessee, the following factors are some of those to be considered in determining if a parental rights termination is in the best interest of the child:

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
>
> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
>
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i). When considering the child's best interest, the court must take the child's, rather than the parent's, perspective. ***White v. Moody***, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004).

Father argues that by weighing the factors above, the trial court should have found that termination of Father's parental rights was not in the best interest of the children. For instance, he asserts that there was no evidence presented at trial as to his having demonstrated brutality, physical, sexual, emotional or psychological abuse, or neglect toward the children, or another child or adult

in the family or household, save for some allegations of domestic violence visited upon Mother, about which no facts and no convictions were presented. Father further contends that a mental/emotional evaluation[4] given to him by Kathy Birchfield, M.Ed. revealed that that he showed no potential for abuse of the children. He further reported no mental problems that would affect his ability to parent.

Father also asserts that he did finally complete eight out of eight "Parenting Skills Group" sessions, an accomplishment that, according to him, shows an effort by him to make an adjustment of his conduct as a parent, which, in turn, would make his home a better place for the children to return. Father additionally argues that proof he maintained a "child-proof" apartment for one year during the course of this case shows that a lasting adjustment is "reasonably possible," as that concept is stated in Tenn. Code Ann. § 36-1-113(i), and that he could maintain a safe physical environment.

Father further contends that if a parent can only see his children once a week for two hours, it is all but impossible to form a "meaningful relationship." He notes that the youngest child was removed from the home almost immediately after birth and never lived with Father. Father was only able to see her once a week for a few hours each time. He claims that even if he had maintained the visits regularly as ordered, a few hours a week with this child would not have been enough to form a lasting, meaningful relationship. Accordingly, Father contends that factor four should have been given little weight.

While the record reflects that Father did not pay child support for these children consistent with the child support guidelines, Father claims that the testimony given by Ms. Moore and Ms. Cline supports his contention that he provided meals and clothes at visitations. Father contends that this should be given some weight as to supporting the children even though it is not consistent with child support guidelines. Father does concede that he had some positive drug screens and a conviction for simple possession of Schedule VI drugs in 2004. He asserts, however, that no evidence was presented that he used drugs inside his home or in the presence of the children.

Father admits that a change of caretakers and physical environment would have some negative effect on the children's mental, emotional, and physical conditions. These children have been in foster care since October 28, 2005, approximately two weeks after they were removed from Mother's care, and are presumably beginning to feel comfortable with the foster care system. Father claims, however, that forever severing the children from their biological father could also have an equally negative effect upon their mental and emotional condition, especially when one of the children is old enough to know who his father is and to realize that his father is no longer in his life.

Ms. Moore noted that "these children think of the foster parents as their parents and moving them . . . would be detrimental to them, not to mention the fact that [Father] has not exhibited an

[4]At this evaluation, Father indicated that he has seven children – 4 grown children in addition to the three at issue in this matter.

ability to parent the children and their mother's parental rights have already been terminated by this Court." Ms. Moore further emphasized the fact that Father did not follow through with the recommendations of his alcohol and drug assessment and had tested positive for drugs, that he had not provided a stable home, and that he had not maintained the required contact with DCS.

In the case before us, as relates to the best interest of the child analysis, the trial court found as follows:

> The Court, after carefully reviewing the statutory factors pertaining to best interest[] of the children finds by clear and convincing evidence that the Department has proven that it is in the best interests of the children for termination of parental rights to occur.

The trial court's judgment further lists at least eight findings of fact on the children's best interests, providing that Father *had not*:

> 1. "made changes in his lifestyle that would make it safe for the children to be returned to him";
>
> 2. "demonstrated that he has the ability or understanding to properly parent the children";
>
> 3. "maintained any relationship with the children";
>
> 4. "paid any child support for the children";
>
> 5. "maintained a stable home for the children"; or
>
> 6. "made any effort whatsoever to work towards getting custody of the children."

The trial court further found that

> 7. Father "has continued to live a chaotic, unstable life"; and
>
> 8. the children "have been placed in a pre-adoptive foster home where their spiritual, physical and emotional needs are being met."

Every order terminating parental rights must include "specific findings of fact and conclusions of law" supporting the termination. Tenn. Code Ann. § 36-1-113(k). Section (k) states that "[t]he court shall enter an order . . . within thirty (30) days of the conclusion of the hearing." Tenn. Code Ann. § 36-1-113(k). "The findings of fact and conclusions of law required by Tenn. Code Ann. § 36-1-113(k) must address the two necessary elements of every termination case. First,

they must address whether one or more of the statutory grounds for termination have been established by clear and convincing evidence. Second, they must address whether terminating the parent's parental rights is in the child's best interest[]." ***In re C.R.B.***, No. M2003-00345-COA-R3-JV, 2003 WL 22680911, at *4 (Tenn. Ct. App. M.S., filed November 13, 2003) (citations omitted). It has also been stated that "[t]he statutory requirement to prepare written findings of fact and conclusions of law applies with equal force to the best interest component of parental termination cases." ***In re G.N.S.***, No. W2006-01437-COA-R3-PT, 2006 WL 3626322, at *7 (Tenn. Ct. App. W.S., filed December 13, 2006).

Father argues that the trial court's order is not in compliance with § 36-1-113(k) due to its lack of conclusions of law, *i.e.*, application of the facts to the factors presented in § 36-1-113(i). Father apparently believes that the order must assign a specific percentage "weight to each factor" enumerated in Tenn. Code Ann. § 36-1-113(i). He contends that the trial court's best interest analysis was invalid and that the judgment should be vacated.

We hold that the evidence does not preponderate against the trial court's findings, and therefore, because those findings are accorded a presumption of correctness, the trial court's decision cannot be overturned. Under the facts of this case, we find that the trial court's findings adequately address the factors listed at § 36-1-113(i)(1) - (5) and (7) - (9). In conducting the best interest analysis, this court often discusses the factual findings that reflect the § 36-1-113(i) factors without quantifying the weight accorded each finding. *See* ***State Dept. of Children's Servs. v. A.M.H.***, 198 S.W.3d 757, 767-69 (Tenn. Ct. App. 2006). As this court noted in ***In re Audrey S.***, 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005), "[t]o ascertain whether a permanent severance of the parent-child relationship is in the child's best interest[], the court must engage in a fact-intensive endeavor, but it need not provide a 'rote examination' of each factor and calculate which result is supported by the most factors." In a case like this where a parent has, *inter alia*, failed to maintain stable housing, continued to abuse drugs, and failed to provide support, termination is clearly in the best interest of the children. *See* ***id***. Even weighing some of the statutory factors in Father's favor does not undercut the trial court's best interest determination.

B.

While Father has conceded one ground for terminating his parental rights, we will, nevertheless, consider his arguments as to the other alleged grounds.

The trial court terminated Father's parental rights based upon the statutory ground of abandonment due to his "willful failure to pay support for these children."

As indicated previously, the grounds for termination of parental rights are listed in Tenn. Code Ann. § 36-1-113(g). The statute provides that initiation of the termination of parental rights may be based upon the ground of "abandonment" as further defined at Tenn. Code Ann. § 36-1-102 (2005). Tenn. Code Ann. § 36-1-102 provides as follows:

> (1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:
>
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child [] . . .

Tenn. Code Ann. § 36-1-102(1)(A). For purposes of subdivision (1), "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means "the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child[] . . ." Tenn. Code Ann. § 36-1-102(1)(D). "Token support" means that "under the circumstances of the individual case," the support is "insignificant given the parent's means." Tenn. Code Ann. § 36-1-102(1)(B). Simply proving that a parent did not support a child is not sufficient to carry this burden. ***In re M.J.B.***, 140 S.W.3d at 655. A parent's failure to support his or her child because he or she is financially unable to do so does not constitute a willful failure to support. *E.g.,* ***O'Daniel***, 905 S.W.2d at 188; ***In re Adoption of Kleshinski***, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at *18 (Tenn. Ct. App. M.S., filed May 4, 2005). "Willful" failure to support a child occurs when a person is aware of his or her duty to support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. ***In re M.J.B.***, 140 S.W.3d at 654. The requirement that the failure to support be "willful" is both a statutory and a constitutional requirement. *See* ***In re Swanson***, 2 S.W.3d 180, 188 (Tenn. 1999).

In ***In re C.M.C.***, No. E2005-00328-COA-R3-PT, 2005 WL 1827855, at *6 (Tenn. Ct. App. W.S., filed August 3, 2005), this court held as follows:

> The element of willfulness is essential to the court's determination of abandonment. *See In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). Although willfulness in the context of the statutes governing the termination of parental rights does not require a finding of malice or ill will, it does require clear and convincing evidence of choice of action, free from coercion, made by a free agent. *In re Adoption of Kleshinski*, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at *18 (Tenn. Ct. App. May 4, 2005) (no perm. app. filed) (citations omitted). . . .

In ***In re Adoption of T.A.M.***, No. M2003-02247-COA-R3-PT, 2004 WL 1085228, at *4 (Tenn. Ct. App. M.S., filed May 12, 2004), this court opined that

> [t]he willfulness of particular conduct depends upon the actor's intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person's mind to assess intentions or motivations. *American Cable Corp. v. ACI Mgmt., Inc.,* No. M1997-00280-COA-R3-CV, 2000 WL 1291265, at * 4 (Tenn. Ct. App. September 14, 2000) (No Tenn. R. App. P. 11 application filed). Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person's actions or conduct. *See Johnson City v. Wolfe*, 103 Tenn. 277, 282, 52 S.W. 991, 992 (1899); *Absar v. Jones*, 833 S.W.2d 86, 89-90 (Tenn. Ct. App. 1992); *State v. Washington*, 658 S.W.2d 144, 146 (Tenn. Crim. App. 1983); *see also In re K.L.C.*, 9 S.W.3d 768, 773 (Mo. Ct. App. 2000). . . .

Father asserts that he receives a disability check as his only means of income, and testimony was presented at trial that he did pay child support for his other children. No testimony was presented as to how much Father received each month or how much was paid for the other children. Father contends that such checks do not provide a large amount of money each month and that taking out more child support would decrease this amount even further. Father claims that he cannot provide necessities for himself if he is making a payment of $75 a month in child support out of the diminished fixed amount he receives each month. He argues therefore that his capacity to make these payments was small and would make his failure to pay monetary support less "willful." Father concedes that he could have moved the court to lower this amount if it was too much given his means.

Father further argues that he made attempts to give support for the children that amounted to more than token support.[5] Testimony was given that Father, at visitations, provided meals, snacks, clothing, shoes, and birthday presents. Considering that his only means of income was a disability check, Father submits that making such provisions at his visitations was not "insignificant" and was as good as Father could have done given his circumstances. Therefore, Father argues that the trial court erred in its finding that Father merely facilitated the visitations with "token support."

Finally, Father would argue that his limited means of income constituted a justifiable excuse for not making any support payments.

DCS argues that the trial court was aware that a monthly disability check was Father's sole income when it ordered him to make child support payments. DCS notes that Father's income was sufficient to allow him to use cocaine and to try to disclaim his substance use by showing Ms. Cline a wallet full of cash while stating: "If I'm doing cocaine then why do I have money?"

On the issue of willful failure to support, the trial court held as follows:

---

[5]For purposes of argument, Father makes the assumption that the trial court was categorizing his efforts as "token support" even though the words are not actually used by the trial court.

> The applicable period then would be July 15th through November 15th[, 2006]. The testimony, uncontested testimony, is that there were no payments made by [Father] for the support of the children during that time; that he did have income during that period. And, of course, there were Permanency Plans that had been ordered, Permanency Plans approved by the court in which he -- and Orders, in which he was Ordered to pay $25.00 per month per child as child support beginning January 1st, 2006. But not only did he not pay child support during that July to November period, he hasn't paid any support at all since January 1st, which was the onset, January 1st, 2006, which was the onset date for those payments.
>
> That according to the testimony and according to the child support records, . . . [Father] would understand the obligation of paying child support, in addition to the fact that he was present in Court when it was ordered, but also, of course, the Child Support Office is reflecting other payments for other named individuals that are children of [Father] at this, at this point.
>
> The State has proven by clear and convincing evidence [Father]'s willful failure to support or make reasonable payments for the support of the children during those four consecutive months. He did provide meals, snacks, drinks for the children and clothing on one occasion, but that those items were for the purpose of facilitating the visitation and not for support.

Father never made a single support payment for the children, despite six ratified permanency plans and an adjudicatory hearing order commanding him to do so. He has drawn disability benefits since 1994. The trial court knew that the disability benefits were Father's source of income when it ordered him to pay child support. As of the time of the trial, Father was making monthly support payments for two of his other children. He signed and received copies of the parenting plans stating that he would pay $25 a month per child in support. Father was also in court when the plans were approved. When Ms. Moore reminded him of his support obligation several times, he never questioned the requirement. DCS advised him in writing that failure to support was a ground for termination of parental rights. Father concedes that the record shows no payment of child support by him. There is no doubt that Father was aware of his duty to support the children.

The evidence does not preponderate against the trial court's finding, by clear and convincing evidence, that Father abandoned the subject children by willfully failing to pay support during the relevant time period.

C.

Parental rights may be terminated based upon the "persistence of conditions" ground for termination as defined in Tenn. Code Ann. § 36-1-113(g)(3)(A). In order to terminate parental rights on this ground, DCS must prove that

> [t]he child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:
>
> (i) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
>
> (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
>
> (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn. Code Ann. § 36-1-113(g)(3)(A).

DCS concedes that the "persistent conditions" ground does not apply to Father. Because the children were not removed by DCS from Father's custody, but rather from Mother's, the ground for terminating parental rights found at Tenn. Code Ann. § 36-1-113(g)(3)(A) -- that "conditions that led to . . . removal . . . still persist" -- does not apply to Father. *See* ***In re B.P.C.,*** No. M2006-02084-COA-R3-PT, 2007 WL 1159199, at *7 (Tenn. Ct. App. M.S., filed April 18, 2007) ("because the actions of B.P.C.'s mother led to his removal from her home (and not Father's) . . . the lower court erred when it relied on this ground"). Therefore, the trial court's judgment is modified to delete this basis for the court's action.

D.

DCS is required to establish by clear and convincing evidence that it made reasonable efforts to reunite the children with the parent. ***In re C.M.M.***, No. M2003-01122-COA-R3-PT, 2004 WL 438326, at *8 (Tenn. Ct. App. M.S., filed March 9, 2004); Tenn. Code Ann.§ 36-1-113(c),(i)(2); Tenn. Code Ann. § 37-1-166 (Supp. 2007). Reasonable efforts are defined in Tenn. Code Ann.§ 37-1-166(g)(1) as the "exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family." They may include DCS's preparing permanency plans, funding and "ma[king] appointments for . . . psychological evaluations,

notif[ying] the parents and their attorneys of the date, time and place of the evaluations and visit[ing] the home to monitor progress in cleaning up the home." ***State Dept. of Children's Servs. v. M.P.***, 173 S.W.3d 794, 805 (Tenn. Ct. App. 2005) (affirming termination). However, even though DCS bears the burden of proving reasonable efforts, the parents "must also make reasonable and appropriate efforts to rehabilitate themselves and to remedy the conditions that required the Department to remove their children from their custody." ***In re Giorgianna H.***, 205 S.W.3d 508, 519 (Tenn. Ct. App. 2006).

In arguing this issue, Father discusses his transportation problems. In the testimony of the DCS case manager, Ms. Moore noted that Father had "reported transportation problems, but he has ridden the bus there in Kingsport and asked [her] for rides." She further indicated that "the only time [she recalled] him asking . . . for transportation was to [a meeting in Rogersville]." In spite of the above testimony, Father contends that DCS did not offer to help with transportation to all of the evaluations, classes, and appointments that Father was required to attend in the plans. Furthermore, according to Father, no other testimony was given as to assisting Father with transportation. He provides the following example: On May 1, 2006, a letter was sent to Father to inform him of a dentist appointment for one of the children in Greeneville, Tennessee, and a map was included with the directions. However, the letter does not make any offer to help with transportation to this appointment, even though it was known that Father had transportation problems throughout the time period. Father contends that not offering transportation to a parent who is known to have transportation problems does not reach the reasonable efforts level.

DCS contends that Father's noncompliance cannot be excused by Father's argument that DCS failed to give him transportation to "all of the evaluations, classes, and appointments." DCS cites several reasons for the failure of this argument. First, in Father's lengthy unsworn statement at trial, while he criticized many aspects of DCS's handling of this case, Father did not complain about transportation. Nor did he attribute his failure to comply with the permanency plans to transportation problems. Second, Father did not contend at trial that DCS had failed to make reasonable efforts or that it had hindered Father in any way by not giving him transportation. Because Father makes this unsupported contention for the first time on appeal, he has waived this argument. *See, e.g.,* ***In re Adoption of E.N.R.***, 42 S.W.3d 26, 32-33 (Tenn. 2001). Despite this waiver, we will examine the substance of Father's arguments on this issue.

The record reveals that Ms. Moore several times offered Father a ride to his psychological intake at Frontier Health; gave Father a ride to the hospital for the drug screens administered there; took Father to a meeting at one child's school; made sure that Father had transportation to the DNA paternity test; and provided Father a ride to the Center of Excellence consultation. Ms. Moore further testified that she "assisted with transportation on numerous occasions" and that there were "numerous times" that she "either picked him up or made sure he had a ride before an appointment was scheduled." Father's refusal to follow the permanency plans was due to his own lack of cooperation, not because DCS did not provide his transportation. The record contains clear and convincing evidence that DCS made reasonable efforts to support and assist Father.

The trial court found that the requirements of the plans were reasonably tailored to remedy the conditions that caused DCS to take custody of the children. DCS made reunification efforts tailored to Father's parental unfitness -- his lack of parenting skills, ongoing cocaine use, and the lack of a stable, suitable home. The trial court found that Father had not substantially complied with the permanency plans. Father's refusal to accept DCS's reasonable reunification efforts caused Father's failure to comply with the permanency plans. *See* ***M.P.***, 173 S.W.3d at 805. The trial court's findings are accorded a presumption of correctness since the evidence does not preponderate otherwise.

V.

The judgment of the trial court, as modified, is affirmed. Costs on appeal are taxed to the appellant, J.C. This case is remanded to the trial court for enforcement of the court's judgment and for the collection of costs assessed below, all pursuant to applicable law.

_____

CHARLES D. SUSANO, JR., JUDGE